HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 759 2004(M/S)

M/S Brit Paints & Chemicals
and another.

Vs.

Addl. District Judge, Dehradun

& another.

Approved for reporting.

_____

~~Not approved for reporting~~

Date of decision 17.8.2004.

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

WRIT PETITION NO. 759 M/S 2004

M/S Brite Paints & Chemicals
& another. ..... Petitioners.

Versus

Addl. District Judge, Dehradun
& another. . ... Respondents.

Sri I.P. Kohli, counsel for the petitioners.
Standing counsel for the respondents.

HON'BLE RAJESH TANDON, J.

Heard Sri V.K. Kohli, Senior Advocate assisted by Sri S.P. Kohli and Standing counsel for respondents.

By the present writ petition the petitioner has challenged the order dated 09.08.2004 by which the order were passed under Order XXXVIII rule 5 of the Code of Civil Procedure.

Brief facts giving rise to the present writ petition are that a suit was filed by the plaintiff-respondent on 08.01.2004. Alongwith the suit itself an application was file under Order XXXVII rule 5 CPC. In paragrapah 24 of the application a statement has been made to the following effect:

''यह कि उपरोक्त वद में पारित होने वाली डिक्री को निरर्थक करने तथा उसकी वसूली में तबालत व देरी करने के उददेष्य से प्रतिवादीगण अपने कारखाने को बेचने तथा Jenson & Nicholson (I) Ltd., 225 Acharya Jagdish Bose Road, Kolkata 700 020 से प्राप्तव्य धनराषी वसूल कर उसे विनियोजित कर लेना चाहते है।''

The Additional District Judge has passed the order Order XXXVIII rule 5 CPC directing the respondents to

give the bank guarantee in terms of the money of Rs. 21,00,000/- for which the suit has been filed. A copy of the plaint shows that the plaintiff supplied materials to the defendant worth Rs.15,94,789,52p. from January, 2001 till February, 2002. A perusal of Order XXXVIII rule 5 CPC provides as under:

"5(1). Where at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he sho7uld not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

It will appear from Order XXVIII rule 5 CPC that the order can be passed at any stage of the suit. The requirement 'at any stage' is after the filing of the suit and not at the time of presenting the plaint itself. At the time of presenting the plaint an application under Order XXXVIX rule 1 can be filed for prevention of the suit property till the disposal of the suit but Order XXXVIII rule 5 CPC, i.e. attachment before judgment can be passed not at the time of the filing of the plaint itself. Order XXXVIII and Order XXXIX are distinct and different as held in AIR SCW 2004 page 4269 Vareed Jacob Vs. Sosamma Geevarghese which is quoted below:

"Accordingly, the Courts have to grant relief of attachment before judgment, if the circumstances fall under 0.38 , C.P.C. Similarly, Court will grant temporary injunction if the case satisfied Order 39. So depending on the circumstances falling in the prescribed rules, the power of the Court to grant specified relief would vary. Therefore, each set of rules prescribed and distinct and different from the other and therefore, one cannot equate rules of temporary injunction with rules of attachment before judgment although all are broadly termed as interlocutory orders."

The court below while passing the orders on the application under Order XXXVIII rule 5 CPC has passed the order simultaneously observing that in order to satisfy the decree the power under Order XXXVIII has been exercised.

The court is required to pass the orders under Order XXXVIII rule 5 CPC when it appears to the court from the affidavit or otherwise that ingredients of clause (a) and (b) of Order XXXVIII are satisfied. The court below has assumed the power of Order XXXI of the Code of Civil Procedure with regard to execution while passing the impugned orders.

The counsel for the petitioner has referred to me AIR 1986 Allahabad 87 Har Krishan Khosla Vs M/S Alembic Chemical Works Co. Ltd. The relevant paragraphs of the judgment are quoted below:

“In A.K.K. Nambiar Vs Union of India, AIR 1970 SC 652 it was held by the Supreme Court that the importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In absence of p roper verification, affidavits cannot be admitted in evidence.”

“In Sukhwinder Pal Bipan Kumar Vs State of Punjab, AIR 1982 SC 65, it was held that under O. XIX R.3 of the Code of Civil Procedure, 1908, it was incumbent upon the dependent to disclose the nature ande source of his knowledge with sufficient particularity and in its absence the allegations in the petition, would not be supported by an affidavit as required by law.”

“In view of this legal position, the question is whether the application for attachment before

judgment deserves to be dismissed on this short ground or an opportunity deserves to be given to the respondents to file a better affidavit."

"In the result, this appeal succeeds and is allowed. The order appealed against dated 13th August, 1985 is set aside and the trial court is directed to decide the application for attachment before judgment afresh according to law and keeping in mind the above observation made above. The application shall be finally disposed of as expeditiously as possible and preferably within 2 months of the production of a certified copy of this order by either of the parties. In the circumstances of the case, however, the parties shall bear their costs. A certified copy of this order may be supplied to the parties today on payment of usual charges."

In AIR 2000 Madras 213 Renox Commercials Ltd. Vs Inventa Technologies Pvt. Ltd. the Madras High Court has also taken the view that mere bald averment that defendant is contemplating to alienate the property is not sufficient and there must be material to that effect. The relevant paragraphs are quoted below:

"As indicated above, the applicant/plaintiff should clearly establish two essential requisites. They are: (i) the defendant is about to dispose of the whole or any part of his property; (ii) that the said disposal is being done with an intention to obstruct or delay the execution of the decree that may be passed against him."

“Thus, in this case, the sine qua non for an order of attachment before judgment, namely, the mala fide intention and the conduct of the defendant in disposing of or about to dispose of his property with the dishonest intention of defeating or delaying the decree that may be passed in the suit, is conspicuously absent.”

In AIR 2002 Bombay 203 Saraswat Co. operative Bank Ltd. Vs Chandrakant Maganlal Shah and others the similar view has been taken in order to applying the provisions of Order XXXVIII C.P.C. Paragraph 24 is quoted below:

“In our view, an order of attachment before judgment has serious consequences to a debtor. It is not an order to be made lightly nor based on bald averments reiterating the statutory provisions. There has to be some prima facie material on the basis of which the court could satisfy itself that the conditions requisite for making an order of attachment before judgment enumerated in Order 38 of the Civil Procedure Code exist. Otherwise, every plaintiff would rush in with a bald averment like the one made by the Bank and obtain an attachment before judgment. Dr. Nail contends that the circumstances that company was in financial strains justified the order for attachment before judgments. In our view, this is unsound. Order 38 of the Civil Procedure Code does not warrant attaching the debtor’s property merely because the debtor may be unable to pay the debt. It contemplates specific situations or specific acts of the debtor which

show an intention to put the property beyond the reach of execution of a decree. On a conspectus of all facts, we are of the view that there existed no circumstances, which could have justified an order of attachment before judgment of the assets of the company, On both counts, we are, therefore, satisfied that there was no case made out for interim relief at all."

In view of the aforesaid propositions of law, the matter is remitted back to the learned Additional District Judge to decide the case afresh after satisfying the ingredients of Order XXXVIII of the Civil Procedure Code in the light of the observations made above.

Subject to the aforesaid observation, the writ petition is disposed of. No order as to costs.

(Hon'ble Rajesh Tandon J.)

Dated: August 17, 2004.
S.S. Negi.